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No. 90-8370

In the

Supreme Court of the United States

OCTOBER TERM, 1991

TEOFILO MEDINA, JR.,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Brief for the Committee on Legal Problems of the Mentally Ill of the Association of the Bar of the City of New York as *Amicus Curiae* in Support of Petitioner and Motion for Leave to File Brief

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Question Presented

This brief addresses the question whether, consistent with the Due Process clauses of the Fifth and Fourteenth Amendments, the State may impose upon a defendant the burden of persuasion of proving his mental incompetence to stand trial by the greater weight of the evidence, where doubt as to competence has been declared by the trial court, and whether the State may impose a mandatory presumption that the defendant is competent after this doubt has arisen.

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Committee on Legal Problems of the Mentally Ill of the Association of the Bar of the City of New York respectfully moves for leave to file the annexed brief *amicus curiae* on behalf of the petitioner in this case. The consent of the attorney for the petitioner was granted and a letter to that effect has been filed with the Clerk of the Court. The attorney for the respondent has refused consent for any *amicus curiae* briefs filed on behalf of petitioner.

The Association of the Bar has a long-standing tradition of involvement in the legal problems of the mentally ill and has authored many studies and reports that have been influential in persuading courts and legislatures to implement needed reforms in the treatment, care and disposition of the mentally ill. *See* Interest of Amicus, *infra*.

The interest of *amicus* in this case stems from the fact that the legal questions being raised, involving the appropriate standards of proof and burden of persuasion that

attend the determination of a criminal defendant's mental competence to stand trial, affect one of the most substantial interests affecting the mentally ill within the criminal justice system. As noted in our brief, the issue of competence to stand trial affects substantial numbers of offenders and is considered by many in the field to be the single most significant mental health inquiry pursued in the criminal justice system. Thus, the outcome of the Court's decision in this case may be expected to generate nationwide impact.

In addition, *amicus* brings to the attention of the Court an additional consideration that is not expected to be briefed and argued by the parties. While this case concerns the constitutionality of a California statute, the analogous federal statute in question, enacted in 1984, shares many of the same constitutionally-suspect features of the California statute. Accordingly, *amicus* would bring to the attention of the Court an important perspective that may not be addressed by the parties.

WHEREFORE leave to file a brief *amicus curiae* on behalf of the Committee on Legal Problems of the Mentally Ill of the Association of the Bar of the City of New York should be granted.

Dated: New York, New York
December 5, 1991

Respectfully submitted,

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Brief for the Committee on Legal Problems of the Mentally Ill of the Association of the Bar of the City of New York as *Amicus Curiae* in Support of Petitioner

Interest of *Amicus Curiae*

Founded in 1870, the Association of the Bar of the City of New York is one of the Nation's oldest and largest membership organizations of attorneys and members of the legal profession with over 20,000 members. It has achieved national recognition for its expertise and commitment to improving the civil and criminal justice systems and has submitted *amicus* briefs on many occasions before this and other courts in that regard. *See, e.g., United States v. Monsanto*, 491 U.S. 600 (1989).

The Association has a long-standing interest and involvement in addressing the legal problems of the mentally ill both within and without the judicial system and has

authored many studies and reports that have been influential in persuading courts and legislatures to implement needed reforms in the treatment, care and disposition of the mentally ill. *See, e.g.*, Special Committee on the Study of Commitment Procedures and the Law Relating to Incompetents, Association of the Bar of the City of New York, *Mental Illness, Due Process and the Criminal Defendant* (1968). *See also United States ex rel. Schuster v. Herold*, 410 F.2d 1071, 1078, 1084-85 (2d Cir. 1969) (adopting Committee's 1968 recommendations) ("As a measure of its position as a respected initiator of needed reforms, we note that the Committee's prior report, made in 1962, led to substantial changes in the Mental Hygiene Law . . . particularly in . . . the procedures for involuntary civil commitment"); *Kesselbrenner v. Anonymous*, 33 N.Y.2d 161, 167, 305 N.E.2d 903, 350 N.Y.S.2d 889, 893 (1973) (accord); *Fhagen v. Miller*, 29 N.Y.2d 348, 351, 278 N.E.2d 615, 328 N.Y.S.2d 393, 394 (1972) (accord).

Amicus has a long tradition of demonstrated interest in safeguarding the rights of the mentally ill along with preserving and strengthening our adversarial system of justice.

Summary of Argument

This Court has emphasized repeatedly that a criminal defendant's right not to be tried unless mentally competent is a core value protected by the Due Process clauses of the Fifth and Fourteenth Amendments. This case considers the constitutional propriety of the judicial procedures by which a determination of a defendant's competence shall be conducted.

The California statutory procedures for determining competence to stand trial are constitutionally flawed in significant respects. They create a mandatory rebuttable presumption that the defendant is competent—even after substantial doubt has arisen sufficient to warrant convening a jury to determine the issue. Moreover, the presumption is allowed to remain in the case even after substantial evidence rebutting it has been presented. In addition, California procedures require the possibly mentally ill defendant to overcome this mandatory presumption by proving his own mental incompetence by a preponderance of the evidence. This heavy burden of persuasion and its improper placement on a possibly incompetent defendant clearly violates the due process principles enunciated in *Pate v. Robinson*, 383 U.S. 375 (1966) and *Drope v. Missouri*, 420 U.S. 162 (1975).

If the concept of competency to stand trial is grounded in notions of fundamental fairness in the operation of the judicial process, evidence firmly establishing competence must be of greater weight than that showing incompetence. There can be no ultimate burden of persuasion placed on the defendant to establish incompetence, particularly where —by virtue of mental illness—he may be disabled from meeting the very burden in question.

Moreover, whatever validity may attach to a presumption of competence insofar as it compels a party initially to produce evidence to rebut it, once that evidence has been presented, the presumption no longer has a proper place in the fact-finder's determination and should be removed from the case. Similarly, the mandatory character of the California statute's presumption is violative of the principles enunciated in *Sandstrom v. Montana*, 442 U.S. 510 (1979) and *Francis v. Franklin*, 471 U.S. 307 (1985).

I. The California statute offends due process insofar as it disallows a finding of incompetence unless proven by the greater weight of the evidence and places the burden of persuasion on the possibly incompetent defendant.

In *Pate v. Robinson*, 383 U.S. 375 (1966) and *Drope v. Missouri*, 420 U.S. 162 (1975), this Court established the constitutional standard by which the trial court is required

to ensure that a defendant is mentally competent to stand trial and face charges. As the Court stated in *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam) and reiterated in *Drope*, the due process rule against trying a mental incompetent is for the protection of a defendant who cannot effectively consult with counsel and cannot comprehend the nature of the proceedings against him.[1]

The purpose of the competency requirement is to guarantee accuracy and fairness of the proceedings, maintain dignity, and ensure that the defendant comprehends the impact of the charge and punishment. A. Stone, *Mental Health and Law: A System in Transition* 201, 204 (1976); A. Matthews, *Mental Disability and the Criminal Law* 19 (Am. Bar Foundation 1970); Note, *Incompetency to Stand Trial*, 81 Harvard L. Rev. 454, 457-58 (1967) (citing accuracy, fairness, dignity, and defendant's comprehension of process).[2]

[1] The frequent judicial blurring of the terms "incompetency" and "insanity" has been characterized by more than one commentator as "vexing." 3 M. Perlin, *Mental Disability Law: Civil and Criminal* § 14.03 at 208 n. 7 (1989). *See, e.g., Bruce v. Estelle*, 483 F.2d 1031, 1041-43 (5th Cir. 1973); *see also Pizzi, infra*, 45 U.Chi. L. Rev. at 50 n. 144.

The legal standard for determining competency to stand trial is, of course, distinct from the insanity defense. The issue of competency focuses on the defendant's mental state during trial. *Drope*, 420 U.S. at 172; *Pate*, 383 U.S. at 378. In contrast, the insanity defense considers the defendant's mental condition at the time of the offense. *Lynch v. Overholser*, 369 U.S. 705, 715 (1962). "[T]he insanity defense and the matter of competence to stand trial are independent of one another because they involve [the defendant's] mental state at different times and because the ultimate questions are different." *United States v. Gold*, 790 F.2d 235, 238 (2d Cir. 1986).

[2] Significantly, while the insanity defense has received far greater public attention, the issue of competence to stand trial affects far greater numbers of offenders and is considered by many in the field to be the single most significant mental health inquiry pursued in the criminal justice system. It has been estimated that as many as 9,000 persons per year are found incompetent to stand trial and that some 25% of the defendants who raise the issue are, in fact, declared incompetent. H. J. Steadman, *Beating a Rap? Defendants Found Incompetent to Stand Trial* 4, 38 (1979). This is in dramatic contrast to the relative rarity with which the insanity defense is raised and the utterly miniscule number of instances in which it proves successful. *See* Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. Rev. 921, 922-23 & n. 3 (1985) ("It is estimated that for each defendant found not guilty by reason of insanity, at least one hundred defendants are determined to be incompetent to stand trial"); Perlin, § 14.02 at 207 n. 1 ("The numerical significance of incompetency determinations contrasts sharply with the remarkably few insanity defense cases adjudicated yearly").

To present a viable defense, a defendant must be able to aid his or her attorney in the preparation of that defense. The competency requirement is thus designed to ensure that this fundamental constitutional precept is valid in every case. Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems*, 45 U. Chi. L. Rev. 21, 22-23 (1977); Silten & Tullis, *Mental Competency in Criminal Proceedings*, 28 Hastings L. J. 1053 (1977); Note, *Should the Burden of Proving Incompetence Rest on the Incompetent?* 64 Iowa L. Rev. 984, 985-86 (1979).[3]

Under the provisions of California Penal Code Sections 1368 and 1369, the trial court is required to conduct an inquiry into the defendant's competence at any time a doubt arises in that regard from any source. In this case, defense counsel moved for a hearing, claiming his client's present inability to cooperate with counsel (799 P.2d at 1288). As required under California law, the trial court

[3] Indeed, under *Pate* and its progeny, the trial court has a non-waivable obligation—irrespective of the concessions of counsel (*Tillery v. Eyman*, 492 F.2d 1056 (9th Cir. 1974); *Suggs v. LaVallee*, 570 F.2d 1092 (2d Cir. 1978))—to conduct an inquiry into a defendant's competence whenever evidence *from any source* raises a question in that regard.

convened a jury and held a hearing on defendant's competence.[4]

Significantly, the jury hearing the evidence of petitioner's mental incompetence was instructed, in accordance with Section 1369(f), that:

> It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. The verdict of the jury shall be unanimous.

The California statute, in other words, creates both a mandatory rebuttable presumption of competence and then places the ultimate burden of proving incompetence on the defendant by a preponderance of the evidence. Accordingly, under the California standard, a jury would

[4] California is one of a minority of jurisdictions that assigns the determination of competence to stand trial to a jury instead of the trial judge. S. Brakel, J. Parry & B. Weiner, eds., *The Mentally Disabled and the Law* 693, 703 (3d ed. 1985) (Am. Bar Foundation Study); Note, *Incompetency to Stand Trial*, 81 Harvard L. Rev. at 455 & n. 8. *See also White v. Estelle*, 459 U.S. 1118, 1125-26 (1983) (Marshall, J., dissenting from denial of certiorari) ("While the jury may be equally qualified to make the findings of fact upon which the determination [of competency] must be based, I have little doubt that a judge ordinarily is better qualified to resolve the constitutional question on the basis of whatever facts are found. (Citation omitted). A judge is generally aware of what a defendant must do to participate in his defense. A judge may be guided by his reading of previous cases resolving questions of competency to stand trial and may develop useful experience in making the competency determination"). A paradigmatic example of the complexity and confusion that can attend jury determinations of competency may be found in *Bruce v. Estelle*, 483 F.2d at 1039-41.

The ABA Criminal Justice Mental Health Standards 7-4.7(c) (1986; rev. 1989) takes the position that "a jury determination of procedural competence is not constitutionally required, even though a deprivation of liberty is involved," *Commentary* at 207. It goes on to note that "[a] defendant's triability is a matter peculiarly within the province of a court, which has a special responsibility to resolve it." *Id.*

be compelled to find a defendant competent to stand trial despite substantial evidence of mental illness and incompetence merely because he has failed to meet the ultimate evidentiary burden of persuasion by the greater weight of the evidence.

This heavy burden of persuasion and its improper placement on the possibly incompetent defendant violates the due process principles enunciated in *Pate*, *Drope* and their progeny. Indeed, the overwhelming majority of jurisdictions that have considered this precise question have quite properly determined that to the extent either party has the burden of persuasion, it should be the prosecution, and the ultimate burden should be that the defendant be demonstrated to be competent to stand trial by the greater weight of the evidence. *See, e.g., United States v. DiGilio*, 538 F.2d 972, 986-89 (3d Cir. 1976); *United States ex rel. Bilyew v. Franzen*, 686 F.2d 1238, 1244-45 (7th Cir. 1982); *Brown v. Warden, Great Meadow Corr. Fac.*, 682 F.2d 348, 351-54 (2d Cir. 1982); *People v. McCullum*, 66 Ill.2d 306, 362 N.E.2d 307, 310-11 (1977); *Commonwealth v. Crowley*, 393 Mass. 393, 471 N.E.2d 353, 357-58 (1984); *State v. Bertrand*, 123 N.H. 719, 465 A.2d 912, 916-17 (1983); *Jolley v. State*, 282 Md. 353, 384 A.2d 91, 98 (1978); *State v. Jones*, 406 N.W.2d 366, 368-70 (S.D. 1987). (*See also* authorities collected in Justice Broussard's dissenting opinion in the Court below (799 P.2d at 1312-13)).

The *DiGilio* Court underscored that, if the concept of competency to stand trial is grounded in notions of fundamental fairness in the operation of the judicial process, evidence firmly establishing competency must be more persuasive than that showing incompetency. 538 F.2d at 988. Of necessity, then, there is no room for a rule of law placing the burden of persuasion on the defendant, particularly where—by virtue of mental illness—he may be disabled from meeting the very burden in question. This premise rests on two further principles:

> First, in order for a criminal proceeding to be fair, our system requires that a defendant be competent; and second, it would be both basically unfair as well as contradictory to say that a defendant who claims he is incompetent should be presumed to have the mental capacity to show that he in fact is incompetent. It simply cannot be assumed . . . that a defendant who may be incompetent possesses "sufficient intelligence that he will be able to adduce evidence of his incompetency which might otherwise be within his grasp." Since there is an inconsistency in a position which expects the defendant to prove his own incompetency, and because the right not to stand trial if one is incompetent is of due process dimensions . . . "there is no room for a rule of law placing any burden of proof on the defendant" regarding the issue of his incompetency.

United States v. Hollis, 569 F.2d 199, 205 (3d Cir. 1977).

The Illinois Supreme Court has similarly assigned the burden of persuasion to the prosecution to establish competency by the greater weight of the evidence:

> Though the legislature has the authority to determine the allocation of the burden of persuasion, it may not allocate these burdens in a manner that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" *Speiser v. Randall*, 357 U.S. 513, 523 (1958).

People v. McCullum, 362 N.E.2d at 310. The same court had noted earlier in *People v. Bender*, 20 Ill.2d 45, 53-54, 169 N.E.2d 328, 332 (1960) that:

> It would be a strange rule, indeed, to impose upon [the defendant] the burden of proving his own incompetency, for the very disability which he would be seeking to prove renders him in-

> capable, either logically or legally, of sustaining the burden of proof.

The American Bar Association's recently promulgated Criminal Justice Mental Health Standards (1986; rev. 1989) have determined that the burden should not be placed on either party, but should be:

> If the court, after hearing the evidence, finds by the greater weight of the evidence that the defendant is competent to stand trial the matter should proceed to trial; if not, the court should proceed to issues of treatment or habilitation to effect competence.

ABA Standard 7-4.8(c)(ii).

In its Commentary on the allocation of the burden of persuasion at the hearing, the ABA Advisory Committee resolved the controversy by suggesting no assignment of the ultimate burden to either party but that, instead, the "hearing should find affirmatively that the greater weight of the evidence supports the court's competency determination." *Commentary* at 214-15. *See also* Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 Geo. Wash. L. Rev. 375, 398-99 (1985) (discussing burden of proof and ABA recommendation that competence be established by greater weight of evidence).[5]

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[5] Paradoxically, at the same time the ABA standards were being promulgated, federal law with respect to the provisions for determining competence to stand trial changed in the opposite direction with the passage of the Insanity Defense Reform Act of 1984 as part of the Comprehensive Crime Control Act of 1984 (Act of Oct. 12, 1984, Pub. L. 98-473, Title II, 401-404, 98 Stat. 2067). Previous case law interpreting the predecessor statutory provision (18 U.S.C. § 4244) provided that the government bore the burden of proving a defendant competent by a preponderance of the evidence—*see, e.g., United States v. Makris*, 535 F.2d 899, 905-06 (5th Cir. 1976); *United States v. Hollis*, 569 F.2d 199, 205 (3d Cir. 1977); *United States ex rel.*

In determining how the "risk of error [should] be allocated"—in deciding the constitutionally appropriate standard of proof and establishing which party should bear the applicable burden of persuasion—this Court has set forth three principal elements to be considered in determining whether a challenged governmental procedure meets the core requirements of due process: (1) the individual's interest affected by the procedure; (2) the risk of erroneous deprivation created by the procedure; and (3) the countervailing governmental interest supporting use of the suspect procedure. *Santosky v. Kramer*, 455 U.S. 745, 758 (1982); *Addington v. Texas*, 441 U.S. 418 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *In re*

S.E.C. v. Billingsley, 766 F.2d 1015, 1022 (7th Cir. 1985). The newly enacted 18 U.S.C. § 4241(d) provides, however, that:

> If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the Court shall commit the defendant to the custody of the Attorney General.

The fundamental change this new federal statute makes in shifting the burden of persuasion from competence to incompetence has been the subject of serious criticism:

> [T]he proposed statute apparently intends to reverse the present "burden of proof" by requiring the court to find "by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent." Even the present law under section 4244 seems preferable to this change in burdens of proof. The new statute misconceives the responsibility of the trial court. It will permit the court to try a defendant even if the court, after having heard the evidence, remains uncertain as to the defendant's competency.

Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems*, 45 U.Chi. L. Rev. at 65-66. *See also United States v. Turner*, 602 F.Supp. 1295, 1300 (S.D.N.Y. 1985) (noting statutory shift in burden of proof).

Winship, 397 U.S. 358, 363-68 (1970). *Winship* also examines an additional element—the importance that historically has been attributed to the procedural factor being challenged. 397 U.S. at 361-63.

From a historical perspective, few principles are as firmly embedded in Anglo-American criminal jurisprudence as the doctrine that an incompetent defendant may not be put to trial. The common law origins of the incompetency doctrine date back to mid-seventeenth century England. *See, e.g.*, 4 W. Blackstone, *Commentaries* 24, 395 (9th ed. 1783); 1 M. Hale, *The History of the Pleas of the Crown*, 34-35 (1736); 3 Coke, *Institutes* 6 (1644); *Frith's Case*, 22 How. St. Tr. 307 (1790); *Kinloch's Case*, 18 How. St. Tr. 395 (1746); and further historical authorities collected in *United States v. Masthers*, 539 F.2d 721, 725 n. 23 (D.C. Cir. 1976) (Bazelon, C.J.); Winick, 32 UCLA L. Rev. at 952; Brakel, *ABF Study* at 694-95; Note, 64 Iowa L. Rev. at 992; and Perlin §§ 14.02-.03.

Historical commentators focused primarily on (1) the incompetent defendant's inability to aid in his defense; (2) the parallels to the historic bans on trials *in absentia;* and (3) the problems raised by defendants who remained mute and could not meaningfully plead to the charge and participate in the ritual of the common law trial. *Id.*

Indeed, this Court's *Dusky* formulation—applicable in the state and federal courts for the last thirty years—was derived from the common law "understand and assist" standard of mental competency, which had been used in the federal courts as early as 1899 in *Youtsey v. United States*, 97 F. 937, 946 (6th Cir. 1899) and 1906 in *United States v. Chisolm*, 149 F. 284, 287 (S.D. Ala. 1906). *See* Pizzi, 45 U. Chi. L. Rev. at 21-23 (discussing *Youtsey* and *Chisolm*); Silten & Tullis, 28 Hastings L. J. at 1059; *see also* Winick, 32 UCLA L. Rev. at 923 n. 4 (discussing common law origins); Perlin § 14.03 (tracing history); and Note, 81 Harvard L. Rev. at 454 & n. 1.

Given its historic pedigree, it is beyond question that the defendant's right not to be tried while incompetent, much like the reasonable doubt standard in *Winship*, "plays a vital role in the American scheme of criminal procedure" (397 U.S. at 363) and has a long history of acceptance as a core principle of fundamental fairness in the administration of criminal justice in this country.

Moreover, a second *Winship* factor cautions strongly that there is a significant risk of error in the accuracy of the adjudicatory process by placing the burden of proof on the defendant. *Mullaney v. Wilbur*, 421 U.S. 684, 686 (1975). The chance of an erroneous competency determination (and subsequent conviction) is arguably increased because of the nature of what the defendant is required to prove. The California statute assumes the negative of the fact the defendant must rebut and overcome. The defendant is thus given the burden of proving that he is unable to aid his attorney in presenting a defense. However, if the defendant is, in fact, unable to aid his attorney in preparing a defense, there is similarly little reason to believe that the defendant will be able to aid the attorney in establishing his incompetence. *DiGilio*, 538 F.2d at 988; *Bilyew*, 686 F.2d at 1245; and Justice Broussard's dissent in the Court below (799 P.2d at 1310-17).

As one commentator has aptly summed up the defendant's dilemma (64 Iowa L. Rev. at 991):

> In short, the state has placed on the defendant the burden of proving a fact that, if true, may be very difficult for the defendant to prove. Because of the statutory allocation of burden of proof, the chances of a truly incompetent defendant being found *competent* to stand trial are significantly increased. Once at trial, the defendant who is erroneously found competent is less likely to be acquitted. The truly incompetent defendant's inability to aid his or her attorney in presenting a defense virtually places that defendant at the mercy of the court. Consequently, the risk of error at a competency hearing is intimately related to the risk of erroneously depriving the incompetent defendant of important personal interests (emphasis in original).

Nor do the cases relied upon by the Court below—*Leland v. Oregon*, 343 U.S. 790 (1952); *Patterson v. New York*, 432 U.S. 197 (1977); *Rivera v. Delaware*, 429 U.S. 877 (1977)—mandate a different result. In those cases, the Court was concerned with the constitutional implications of the States' power to define the substantive elements of crimes within their jurisdiction and the degree of permissible burden shifting the States may constitutionally impose on defendants with respect to proving such affirmative or intent-negativing defenses as insanity, absence of malice and extreme emotional disturbance. *See* Eule, *The Presumption of Sanity: Bursting the Bubble*, 25 UCLA L. Rev. 637, 673-83 (1978) (discussing impact of *Rivera* on *Leland*, *Patterson*, *Mullaney* and *Winship*). *See also* Note, 64 Iowa L. Rev. at 996-98 (discussing *Rivera's* inapplicability in the incompetency context). These cases are manifestly irrelevant to the degree of procedural due process to which a defendant is entitled to safeguard his fundamental right not to be tried while mentally incompetent—a core due process protection guaranteed in *Pate* and *Drope*. The competency requirement—in contrast to the insanity defense—is not directly related to the defendant's culpability. Its primary function is to ensure that a defendant may properly exercise his constitutional rights during the course of the trial proceedings in which his culpability and blameworthiness are to be determined.

It remains a subject of arguable debate whether—and, if so, under what procedural formulations—the States are constitutionally compelled to provide an insanity defense as an exculpatory or mitigating feature of its substantive criminal jurisprudence. *See, e.g.*, A. Goldstein, *The Insanity Defense* (1967); N. Morris, *Psychiatry and the Dan-*

gerous Criminal, 41 S. Cal. L. Rev. 514 (1968); and Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. Cal. L. Rev. 779 (1985).

After *Pate* and *Drope*, however, it is beyond any and all debate that a defendant has an overriding constitutional right—firmly grounded in the Due Process clauses of the Fifth and Fourteenth Amendments—*not* to be compelled to stand trial while mentally incompetent. Perforce he has the correlative right to constitutionally adequate procedures by which this right properly must be safeguarded. *Drope*, 420 U.S. at 181; *Pate*, 383 U.S. at 385. As noted by the New Hampshire Supreme Court in precisely this context (*State v. Bertrand*, 465 A.2d at 916):

> [W]e perceive no inconsistency in placing upon the State the burden of proof that the defendant is competent at the time of trial and placing upon the defendant the burden of proof that he was insane at the time of the offense (citation omitted) . . . federal due process mandates that a defendant not be tried for the offense while he is mentally incompetent (citations omitted).
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> • • •
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> . . . We believe that a necessary ingredient of that constitutional mandate is that the burden rest upon the state to prove the defendant's *competency* to stand trial (emphasis in original).

Nor may the courts place the burden of proof on the defendant simply on the basis that he has the greatest access and familiarity with the evidence of his own mental incompetency. As *Pate* and *Drope* make clear, the trial court has an independent and nonwaivable duty to determine the mental competence of a defendant—an obligation of due process dimensions. Accordingly, a defendant may be compelled to submit to psychiatric and judicial evaluation to determine competency to stand trial notwithstanding his Fifth Amendment rights.

In *Estelle v. Smith*, 451 U.S. 454, 465 (1979), this Court determined that a defendant may be compelled to submit to psychiatric evaluations with respect to his competency to stand trial so long as the results were used solely for that purpose and did not generate evidence for the prosecution at the guilt phase or penalty phase of trial (*id.* at 468-69):

> If, upon being adequately warned, respondent had indicated that he would not answer Dr. Grigson's questions, the validly ordered competency examination nevertheless could have proceeded upon the condition that the results would be applied solely for that purpose. In such circumstances, the proper conduct and use of competency and sanity examinations are not frustrated, but the State must make its case on future dangerousness in some other way.

See also Welsh S. White, *The Psychiatric Examination and the Fifth Amendment Privilege in Capital Cases*, 74 J. Crim. L. & Crimin. 943, 947 & n. 21, 951-52, 966-67, 971-74 (1983) (suggesting *Simmons* and *Kastigar* use-immunity for statements made during compelled competency determinations).[6]

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[6] *Estelle*, of course, is not exactly a precedent-shattering expansion of the law on this point. Several Circuits have held that, consonant with the Fifth Amendment, a defendant may be compelled to submit to a psychiatric determination of competency to stand trial but that the evidence adduced is inadmissible at trial on the issue of mental responsibility. *See especially Battie v. Estelle*, 655 F.2d 692, 700-1 (5th Cir. 1981); *United States v. Alvarez*, 519 F.2d 1036, 1042-45 (3d Cir. 1975); *United States v. Malcolm*, 475 F.2d 420, 427 (9th Cir. 1973); *United States v. Driscoll*, 399 F.2d 135 (2d Cir. 1968). Indeed, recent federal law has statutorily codified the *Estelle* prohibition. 18 U.S.C. § 4247(g). *See* S. Rep. No. 98-225, at 238, 1984 U.S. Code Cong. & Admin. News at 3420.

The ABA Standards similarly forbid the use of information obtained from a defendant during the course of a competency determination for any other purpose in the criminal process. *See* ABA Standards 7-4.6(a). *See also* Bennett, 53 Geo. Wash. L. Rev. at 406.

Accordingly, it is axiomatic that given the fundamental due process values protected by the constitutional requirement that a defendant not be tried unless competent to stand trial, the burden of proof must be that *competence* be established by the greater weight of the evidence. ABA Standards 7-4.8(c)(ii).

With respect to the precise quantum of proof to be constitutionally required, the lower courts have differed substantially—some requiring preponderance of the evidence while others demand proof beyond reasonable doubt. *Compare State ex rel. Matalik v. Schubert*, 57 Wisc. 315, 327, 204 N.W. 2d 13, 18 (1973) (beyond reasonable doubt); *Jolley v. State*, 384 A.2d at 98 (reasonable doubt); *State v. Aumann*, 265 N.W.2d 316, 320-23 (Iowa 1978) (Mason, Rawlings and McCormick, JJ., dissenting) (reasonable doubt) *with United States v. DiGilio*, 538 F.2d at 988 (collecting cases) (preponderance). To the extent that this Court has dealt with preliminary fact determinations and admissibility of evidence at trial, it has favored the preponderance of the evidence standard. *See, e.g., Huddleston v. United States*, 485 U.S. 681, 687 n. 5 (1988); *Bourjaily v. United States*, 483 U.S. 171, 175 (1987); *Colorado v. Connelly*, 479 U.S. 157, 167-69 (1986); *Lego v. Twomey*, 404 U.S. 477, 488 (1972).

Nevertheless, this Court has recognized that the mentally ill have a substantial liberty interest of such weight and gravity that warrants a higher standard of proof than mere preponderance of the evidence. *Addington v. Texas*, 441 U.S. 418, 423-25 (1979). Accordingly, this Court has imposed an intermediate "clear and convincing" evidence requirement where the liberty interests of the mentally ill are at stake. Indeed, the American Bar Foundation Study has suggested that this more rigorous standard of proof may apply to competency determinations as well, since a finding of incompetency often results in involuntary hospitalization. Brakel, *ABF Study* at 703 (collecting authorities). Moreover, where important constitutional policies

are involved, the standard applicable to burdens of proof placed on the government frequently depend upon the perceived social utility and deference to be accorded these rights. *See* Edmund Morgan, *Basic Problems of Evidence* § 2.07 at 38 (6th ed. M. Martin 1988). All of these factors suggest that the liberty interests at stake may call for a higher degree of reliability in apportioning the risk of error than a mere preponderance of the evidence.

In *Santosky v. Kramer*, 455 U.S. at 755, a case which upheld the "clear and convincing" standard (albeit in a different context), the Court determined that:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.

Given the respective interests at stake in these proceedings, the Court may well find it prudential to afford the lower courts the first opportunity to reconsider the quantum of proof appropriate to accommodate the parties' divergent interests. Nevertheless, as an irreducible constitutional minimum, the Court should hold—in conformance with the ABA Standards—that the minimum quantum of proof should be the "greater weight of the evidence" establishing the defendant's mental competence.

II. California's mandatory presumption of competence is incompatible with due process as it constitutes an impermissible burden-shifting impediment to the ultimate determination of mental competence.

Both the majority and dissenting opinions below (799 P.2d at 1289 & 1311 n. 1) agree that California Penal Code Section 1369(f) provides that the jury deciding a defendant's mental competence to stand trial must be instructed that:

> It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent.

Petitioner's competency jury was so instructed in this case (799 P.2d at 1311 n. 1).

Under the California system, the presumption of competency imposes not merely a burden of production on the defendant—it thereafter continues in the case as a specie of evidence, acting as a mandatory rebuttable presumption affecting the ultimate burden of persuasion that the defendant must overcome.[7]

The law governing constitutionally permissible uses to which inferences and presumptions may be put in instructing the jury in making preliminary and ultimate factual determinations has not run an entirely clear course in this Court. *See, e.g., Sandstrom v. Montana*, 442 U.S. 510 (1979); *Ulster County Court v. Allen*, 442 U.S. 140 (1979); *Francis v. Franklin*, 471 U.S. 307 (1985); *Rose v. Clark*, 478 U.S. 570 (1986); *Pope v. Illinois*, 481 U.S. 497 (1987); *Carella v. California*, 491 U.S. 263, 268-73 (1989) (jury instructions creating certain mandatory presumptions which impermissibly shift the burden of proof from the prosecution to the defense with respect to intent or other essential elements of the criminal offense are constitutionally suspect).

In *Sandstrom v. Montana*, 442 U.S. at 513, this Court held that a trial court's jury instruction that "[t]he law

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[7]*Compare Taylor v. Kentucky*, 436 U.S. 478 (1978) where this Court, in contrast, reiterated that while instructing a jury on the presumption of innocence is appropriate, instructing them that the presumption itself is a form of evidence has "a tendency to mislead." *Id.* at 485 & n. 12 (and authorities collected therein). *See also Rules of Evidence, 1974: Hearings on H.R. 5463 Before Senate Comm. on Judiciary*, 93rd Cong., 2d Sess. 56 (1974) ("Presumptions are not evidence, but ways of dealing with evidence"); California law formally recognizes this distinction. Cal. Evid. Code § 600 ("A presumption is not evidence").

presumes that a person intends the ordinary consequences of his voluntary acts" created an unconstitutional mandatory presumption on the element of intent. 442 U.S. at 515. The Court held that this instruction deprived the defendant of due process because it was susceptible to an interpretation that removed the prosecution's burden of proving the element of intent beyond a reasonable doubt. *Id.* at 524. *See also Yates v. Aiken*, 484 U.S. 211, 214 (1988) (instruction that malice implied from use of deadly weapon unconstitutionally removed States' burden of proving intent).

Subsequently, in *Francis v. Franklin*, 471 U.S. at 315-18, the Court underscored that a *Sandstrom*-type instruction was unconstitutional even when accompanied by an explicit reminder that the presumption was rebuttable (*id.* at 314):

> The challenged sentences are cast in the language of command. They instruct the jury that "acts . . . *are presumed* . . . " and that a person "*is presumed* to intend . . . " These words carry precisely the message of the language condemned in *Sandstrom*. (Emphasis in original).

Although Franklin's jury, unlike Sandstrom's, was explicitly told that the presumptions "may be rebutted" (471 U.S. at 318), the Court nonetheless determined that such cautionary language was insufficient to vitiate the taint, as it may have been understood merely as suggesting that the defendant had an affirmative ultimate burden of persuasion after the State had proven the basic underlying acts (471 U.S. at 317):

> [Even h]ad the [*Sandstrom*] jury reasonably understood the instructions as creating a mandatory *rebuttable* presumption the instructions would have been no less constitutionally infirm (citation omitted).

• • •

> A mandatory rebuttable presumption does not remove the presumed element from the case if the State proves the predicate facts, but it nonetheless relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding. A mandatory rebuttable presumption is perhaps less onerous from the defendant's perspective, but it is no less unconstitutional (emphasis in original).

See also Carella v. California, 491 U.S. at 265-66.

In this case, it is axiomatic that California has created a similarly mandatory—albeit arguably rebuttable—presumption of competency. *See* § 1369(f) ("It shall be presumed . . . unless . . . "). It affects not only the defendant's burden to produce evidence in rebuttal but it also continues in the case as having independent evidentiary and potentially dispositive weight even after the defendant has produced sufficient rebuttal evidence.[8]

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[8] *Ulster County Court* divided mandatory presumptions into two kinds (442 U.S. at 157 n. 16):

> Presumptions that only shift the burden of production to the defendant, returning the ultimate burden of persuasion to the prosecution if the defendant meets his burden of production; and presumptions that entirely shift the burden of proof to the defendant.

See also Francis v. Franklin, 471 U.S. at 314 n. 2 ("A mandatory presumption may be either conclusive or rebuttable . . . . A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted") (citing *Sandstrom*, 442 U.S. at 517-18).

Manifestly, the California statute is of the mandatory rebuttable variety, irrevocably shifting to the defendant the ultimate burden of production and persuasion. *See* Comment, *Mandatory and Permissive Presumptions in Criminal Cases: The Morass Created by Allen*, 42 U. Miami L. Rev. 1009, 1020-22, 1025-28 (1988).

Whatever constitutional validity such a presumption may have as placing upon the defendant an initial burden of production—although *cf. Francis v. Franklin*, 471 U.S. at 314 n. 3—nevertheless, once such evidence has been presented, the presumption should thereupon be out of the case and should not be relied upon either by the prosecution or the trier of fact. *See* Eule, *The Presumption of Sanity*, 25 UCLA L. Rev. at 691-98.

While the presumptions of sanity and competency have sometimes been improperly conflated—they are, of course, analytically distinct—it is nevertheless common ground that the presumptions have the procedural consequence of shifting the initial burden of production on to the defendant. *See generally* 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 300[01] at 300-2 to 300-5 (1982). Under the so-called *"Thayer"* rule—which has been adopted by the American Law Institute in its Model Code of Evidence [Rule 704(2)] and is favored by most authorities in the field of evidence (*e.g.*, 9 Wigmore, *Evidence* § 2491 (Chadbourn rev. 1981))—"fixing the duty of going forward with proof . . . and this alone, appears to be characteristic and essential work of the presumption." Thayer, *A Preliminary Treatise on Evidence at the Common Law* 337 (1898). Once this initial standard has been met, the presumption disappears like a "bursting bubble" and, being no longer in the case, is not to be mentioned to the jury at all. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 27 (1976) (applying *Thayer's* theory); *see especially United States v. Hendrix*, 542 F.2d 879, 881-82 (2d Cir. 1976) (collecting federal cases on presumption of sanity and adopting *Thayer* rule); *United States v. Andrew*, 666 F.2d 915, 917-18 (5th Cir. 1982) (collecting cases). *See also* Eule, 25 UCLA L. Rev. at 696 & nn. 301-2.

The pernicious danger of allowing juries to consider a mandatory presumption of competence after evidence rebutting it has been admitted is the virtual certainty that they

will continue to count the presumption against the defendant rather than weighing strictly the evidence actually adduced on the merits of the controverted factual question. Nesson, *Rationality, Presumptions, and Judicial Comment: A Response to Professor Allen*, 94 Harvard L. Rev. 1574, 1576 n. 9 (1981) ("jury instructions embodying criminal presumptions always introduce unconstitutional irrationality into the criminal process. Such instructions abstract a single fact (the presumption's predicate) from the broader factual matrix of the case, and then authorize an inference beyond reasonable doubt from the predicate to the presumption's conclusion"), *discussing* Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 Harvard L. Rev. 1187 (1977).

Jury instructions on presumptions have been characterized as disguised comments on the evidence and manipulations of the burden of persuasion on the presumed fact. Reliance upon such presumptions after evidence rebutting it has been introduced is seen as injecting "an irrational component into the jury decisionmaking process" R. Allen, *Presumptions in Civil Actions Reconsidered*, 66 Iowa L. Rev. 843, 856-59 (1981). This danger is recognized as being particularly prejudicial to the defendant in the criminal context (R. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Approach to Evidentiary Devices*, 94 Harvard L. Rev. 321, 331-32 (1980)):

> The judge's comment increases the chance of conviction by enhancing the effect of the state's evidence. In order for the defendant to have the same chance of acquittal . . . . he would have to adduce more persuasive rebuttal evidence than that advanced in the . . . case [in which no inference or presumption was mentioned]. Although the formal relationship between the state and the defendant has remained the same—the jury has applied the reasonable doubt standard in each case—the comment has modified what may profitably be called the relative burdens of persuasion by altering the factual matrix within which the jury reached its decision. The effect of judicial comment, then, is to shift the positions of the parties by modifying the relative burden of persuasion that a defendant bears on an issue just as with affirmative defenses and placement of the burden of production.[9]

In this case, of course, the danger is that where the evidence of competency and incompetency may have been in a state of equipoise, the jury might well have utilized the presumption simply to mechanically tip the scales against a defendant whose mental competence is demonstrably dubious at best. *See, e.g., Bilyew*, 686 F.2d at 1245-46; *DiGilio*, 538 F.2d at 988. Thus, the inherent danger of instructing jurors in terms of such mandatory presump-

[9] Indeed, recent studies suggest that judicial instructions on presumptions and inferences have a disproportionate impact and may, in effect, communicate a "mandatory" rule of law to the jury either because of the general aura of legal authority surrounding the presumption or through the formal rhetoric by which it is conveyed. *See* Note, *The Improper Use of Presumptions in Recent Criminal Law Adjudication*, 38 Stanford L. Rev. 423, 439, 441-42, 453-54, 456 (1986). In a series of empirical studies—including Stanley Milgram's experiments on the effects of authority on obedience (*id.* at 442-46) and Rita James Simon's studies with experimental juries on the effect of legal rules on verdicts (*id.* at 447-50)—the preliminary results suggest that the authority with which a presumption is communicated can strongly orient—or, if necessary, reorient—the jurors' decisionmaking processes so as to bring them into conformity with the presumption. *Id.* at 450. As the Stanford commentator concludes (38 Stan. L. Rev. at 456):

> Taken together, the empirical and legal analyses strongly suggest that the "dignifying formalities" of an authoritative legal presumption carry significant weight with juries and reduce their sense of responsibility and moral sensitivity. An aura of authority, professionalism, and experience surrounds permissive presumptions because they have been found sufficiently reasonable and reliable to receive the official legal imprimatur of the state.

tions is that their validity is "logically divorced from [the particular facts presented by the State] and based [instead] on the presumption's accuracy in the run of cases." *Ulster County Court*, 442 U.S. at 159.

Accordingly, once facts rebutting the presumption were produced—as was done here when the trial court determined there to be sufficient grounds to warrant empaneling a jury to make formal inquiry into petitioner's competence and substantial controverted evidence was subsequently adduced at the competency hearing before the jury—the presumption should have disappeared from the case rather than having lingered to impermissibly tip the scales against the defendant. As Professor Eule has put it (25 UCLA L. Rev. at 698):

> [Once evidence rebutting the presumption of sanity has been introduced] the continued evidentiary role of the presumption cannot be tolerated. It is one thing to believe that jurors will inevitably draw the inference on their own; it is quite another to put the prestige of the court behind such ill conceived and potentially confusing notions.

Coupled with the unconstitutional placement of the ultimate burden of persuasion onto the petitioner, the California statute's creation of a mandatory presumption of competence deprived him of a fair and factually accurate assessment of the merits of his claim of mental incompetency—an assessment unencumbered by discredited legal fictions such as "presumptions of competency.[10]

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[10] *See* Note, 38 Stan. L. Rev. at 461:

> Legal doctrine becomes socially invalid when it depends on assumptions about human nature that do not stand up to modern scientific scrutiny. Removing the mandatory-permissive distinction would help to focus reviewing courts' attention on a less fact-specific dispute—whether the presumption is empirically valid.

CONCLUSION

The judgment of the California Supreme Court should be reversed.

Respectfully submitted,

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This brief is dedicated to the memory of Robert Kasanof, a member of the Bar of this Court as well as the Association of the Bar of the City of New York, for his lifelong commitment to the cause of Equal Justice Under Law.